

July 13, 2012

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210 South Broad Street
Lansdale, Pa 19446
E: Retail License Transfer

Dear Mr. Sommar:

ISSUE: This office is in receipt of your e-mail of June 22, 2012, in which you ask follow-up questions regarding Advisory Opinion No. 12-234, which was issued to you on June 22, 2012, in response to your initial e-mail inquiry on May 23, 2012.

In your May 23, 2012 e-mail, you advised that you represent a distributor (“D”) licensee whose officer owns the property and leases it to the licensee. The licensee’s daughter is seeking to obtain the transfer of a restaurant liquor license (“R”) to use in a separate part of the same building that currently houses the D license. You asked if the daughter would be permitted to use the R license if the building is converted into condominiums for each separate section of the building and the section where the R license would be located would be owned by an irrevocable trust. You also asked if the creation of the Trust and the Condominium Declaration would need to be created prior to the application for transfer or whether the approval of the transfer can be conditioned on the completion of the trust.

In Advisory Opinion No. 12-234, this office advised that the Liquor Code would prohibit your client, as the holder of a D license, from having any ownership or leasehold interest in the property which may be used by the R license. [47 P.S. §§ 4-443(d), 4-443(g), 4-438(c)]. As you had indicated that the building will be converted to condominiums, this office cautioned that any easements across any common areas would also be problematic, as the owner of a D license would not be permitted to hold an easement across the restaurant licensed premises. Further, this office noted that section 3.52(b) of the Board’s Regulations prohibits a licensed premises from having an inside passage or communication to or with any

business conducted by the licensee or other persons, except as approved by the Board. [40 Pa. Code § 3.52(b)].

This office further advised that the D licensee cannot have any interest in the R license, including that of owner, landlord, or lender. Moreover, due to the interlocking business prohibitions, as detailed above, this office advised that the trust and condo declaration would need to be established prior to any potential approval. As you did not indicate who the trustee would be or the beneficiary of the trust, this office advised that, in establishing a blind trust, neither your client, nor his daughter, could be the trustee or the beneficiary of the trust.

In your follow-up e-mail of June 22, 2012, you ask whether easements may be permitted if there is no common entrance way and the R license unit has its own separate ingress and egress with the only easement in the building being the utility lines which run through the building. You also ask whether a common outdoor parking area for the condominium would have to be segregated.

With respect to the irrevocable trust issue, while you understand that your client, the D licensee, could not be the trustee of the trust, you ask what provision of the law would prohibit the client's daughter from being a beneficiary of the trust, so that you can prepare an appropriate trust document.

OPINION: With respect to the easement issue, based upon your representation, it appears that there would be no common entrance way and the R license condominium unit would have its own separate ingress and egress. Further, you advise that the only easement to the R license unit would consist of utility lines connecting the various units within the building. Based on this representation, it is the opinion of this office that the proposed configuration would be permissible. Further, unless the common outdoor parking area is licensed, or will be licensed, there would be no need for segregation of the parking lot.

With respect to the trust issue, as you previously noted, your client's daughter is seeking the transfer of a restaurant liquor license. Be advised that pursuant to section 411(e) of the Liquor Code, she could not therefore have any interest, whether direct or indirect, in the ownership or leasehold of any property, or any mortgage lien against the same, used by a distributor or importing distributor. [47 P.S. § 4-411(e)]. This office would deem your client's daughter's beneficial

interest in a trust that has an ownership interest in property leased to a distributor as a violation of this section. For your reference, the text of section 411(e) is provided below:

(e) Except as herein provided, no hotel, restaurant, retail dispenser or club licensee, and no officer, director or stockholder, agent or employe of any such licensee shall in any wise be interested, directly or indirectly, in the ownership or leasehold of any property or the equipment of any property or any mortgage lien against the same, used by a distributor, importing distributor, or by an importer or sacramental wine licensee, in the conduct of his business; nor shall any hotel, restaurant, retail dispenser or club licensee, or any officer, director, stockholder, agent or employe of any such licensee, either directly or indirectly, lend any moneys, credit, or give anything of value or the equivalent thereof, to any distributor, importing distributor, importer or sacramental wine licensee, for equipping, fitting out, or maintaining and conducting, either in whole or in part, an establishment used in the conduct of his business.

The purpose of this section is to require a separation of the financial and business interests between manufacturers and holders of hotel or restaurant liquor licenses and, as herein provided, of club licenses, issued under this article, and no person shall, by any device whatsoever, directly or indirectly, evade the provisions of the section. But in view of existing economic conditions, nothing contained in this section shall be construed to prohibit the ownership of property or conflicting interest by a manufacturer of any place occupied by a licensee under this article after the manufacturer has continuously owned and had a conflicting interest in such place for a period of at least five years prior to July eighteenth, one thousand nine hundred thirty-five: Provided, however, That this clause shall not prohibit any hotel, restaurant or club liquor licensee from owning land which is leased to, and the buildings thereon owned by, a holder of a retail dispenser's license; and nothing in this clause shall prevent the issuance of a retail dispenser's license to a lessee of such lands who owns the buildings thereon: And, provided further, That nothing

contained in this section shall be construed to prohibit any hotel, restaurant, retail dispenser or club licensee or any officer, director or stockholder, agent or employe of any such licensee from having a financial or other interest, directly or indirectly in the ownership or leasehold of any property or the equipment of any property or any mortgage lien against same, used, leased by an importer or sacramental wine licensee for the exclusive purpose of maintaining commercial offices and on the condition that said property is not used for the storage or sale of liquor or malt or brewed beverages in any quantity: And, provided further, That nothing contained in this section shall prohibit an officer or member of a licensed privately owned private golf course catering club from having an interest in a limited winery license: And, provided further, That nothing contained in this section shall be construed to prohibit a member of the governing board of a public authority created under subdivision (n) of Article XXIII of the act of August 9, 1955 (P.L. 323, No. 130), known as "The County Code," from having an interest in a distributor or importing distributor license notwithstanding the fact that the public authority has an interest in one or more retail licenses or acts as a landlord for one or more retail licenses: And, provided further, That, nothing in this section may prohibit an employe of a hotel or restaurant licensee from having an interest in any property used by a limited winery licensee or in guaranteeing any loans, or lending any moneys, providing credit or giving anything of value to a limited winery licensee or its officers, directors and shareholders, provided that the person also is not an officer of or does not have any interest in or exercise any control over any other licensed entity that engages in any sales to or from the licensee: And, provided further, That, notwithstanding any other provision of this section, an entity may acquire both a manufacturer's license or a limited winery license and a hotel, restaurant or retail dispenser license for use at the same location and more than one location may be so licensed. The licenses and a person's interest in the licenses or in the entity holding the licenses shall not be subject to this section. Provided further, That, a person who is a holder of five per centum (5%) or less of securities or other interests in a publicly or privately held domestic or foreign

corporation, partnership, limited liability company or other form of legal entity owning a restaurant liquor license or retail dispenser's license shall not be deemed to possess a financial interest and is not subject to the provisions of this section, provided that the person is not an officer of, employe of or does not have any interest in or exercise any control over any other licensed entity that engages in any sales to or from the restaurant liquor or retail dispenser licensee in which the person holds the five per centum (5%) or less interest.

[Id.]. Should you have any further questions regarding this issue, please contact this office.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Acting Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 12-267